INDEX

	Page
STATEMENT OF THE CASE	2-11
1. Introduction	2
2. Background and History	3
3. The Latest Proceedings Below	6
4. The Facts Presented to the Lower Courts	7
A. 1974 Feeder Plan	8
B. The Board's Construction Plan	10
C. "Dual System"	10
ARGUMENT	12-30
Reasons for Denying the Writ	
1. Post-Unitary Jurisdictional and Remedial Standards	12
2. The School Board's Revision of the Feeder Pattern for Miami Northwestern Senior High School was a Normal and Needed Administrative Correction, Racially Neutral and Having No Adverse Effect on the Unitary System	18
3. The Dade County School System, Unitary for Five Years, Demonstrates Improvement Rather Than Regression, and No Basis Exists for Massive Reconstruction Through New Comprehensive Desegregation Plans	23
CONCLUSION	31
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

Case	Page
Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), aff'd per curiam, 412 U.S. 92, 93 S.Ct. 1952	27
Darville v. Dade County School Board, 497 F.2d 1002 (5th Cir. 1974)	6, 14
Davis v. Board of School Commissioners of Mobile, 91 S.Ct. 1289 (1971)	27
Goss v. Board of Education of Knoxville, 482 F.2d 1044 (6th Cir. 1973), cert. den. 414 U.S. 1171	28
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 93 S.Ct. 2826 (1973)	24
Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112 (1974)	18
Northcross v. Board of Education of Memphis City Schools, 489 F.2d 15 (6th Cir. 1973), cert. den. 416 U.S. 962	27, 28
Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir. 1970), cert. den. 402 U.S. 953, 91 S.Ct. 1613 (1971)	3, 13, 19, 26

TABLE OF AUTHORITIES (continued)

Case	Page
Pate v. Dade County School Board, 447 F.2d 150 (5th Cir. 1971), cert. den. 405 U.S. 1064, 92 S.Ct. 1493 (1972)	4, 13
Spencer v. Kugler, 326 F.Supp. 1235 (D.N.J. 1971), aff'd. mem. 404 U.S. 1027, 92 S.Ct. 707	27
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971)	3, 13, 17, 27, 28, 29

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 12(b)	8

in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

NO. 74-1493

ALICE LOVE, et al.,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

1. Introduction

The desegregation of the Dade County public school system, the sixth largest school district in the nation located within the most extensive urban-metropolitan area in Florida, has been a complex and evolving process over the past five years. The petitioners' statement of the case is inadequate as a presentation of the background and context of the most recent proceedings which are now the subject of their petition for certiorari. This is the fourth attempt by the American Civil Liberties Union of Florida and other intervenors, since 1970, to force a wholesale reopening of this case, with the objective of imposing a systemwide master plan of racial quotas or balances in all schools in Dade County.

Petitioners have not asked that the record in the Court of Appeals be transmitted to this Court, but have elected to make their presentation based upon their interpretation of the record, plus a few selected excerpts from their own Petition for Supplemental Relief originally filed in the District Court, which they have reprinted in the appendix to their petition to this Court. We believe that the issues cannot be fully understood without reference to the pleadings below, including the charts and exhibits which cannot be reproduced in appendix form to this brief. Accordingly, we have requested that the entire record which was before the Court of Appeals be certified and transmitted, in accordance with this Court's Rule 21. References to the record herein will be according to the index and pagination of that official record on appeal, as prepared by the clerk of the District Court. (We note that petitioners' references are apparently to the incomplete "reproduced

record" which they filed with the Court of Appeals, and their page references are thus out of phase with the numbering assigned by the clerk.)

1. Background and History

This case began in August, 1969, when the School Board invoked the jurisdiction of the federal court to protect itself against an attack in the state court by a citizen who sought to enjoin the Board from implementing a desegregation plan it had approved for the 1969-1970 school year. Prior to that, over a period of about ten years, the Board had voluntarily taken moderate steps to desegregate the school system. The 1969-1970 plan was found insufficient by the District Judge, and after a labyrinth of proceedings extending over a period of a year, the Fifth Circuit in a careful and exhaustive opinion reviewed the District Judge's orders approving a final desegregation plan, required further extensive modifications to the student assignment elements of the plan, and thereupon held that the total plan as modified would effectively desegregate the Dade County school system. *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. den.* 402 U.S. 953, 91 S.Ct. 1613 (1971). The petitioner American Civil Liberties Union had urged fixed racial ratios in every school, a contention rejected by the District Judge *(Pate, supra* at page 1160) and by the Court of Appeals.

One year later, after the decisions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971) and its companion cases, the District Judge entered an order on June 14, 1971 (R. 1), outlining the continuing duty of the School Board to make the desegregation plan work, recognizing his own responsibility

to assure that the school system remained unitary, and giving all parties an opportunity to object to the Board's 1971-1972 pupil assignment plan. On June 18, 1971 the District Judge approved the plan, relieved the Board of any duty to obtain prior approval of further changes, and fixed the burden as to any further proceedings as follows (R. 5):

> "The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the School Board's failure to act in accordance with the principles outlined in this Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

At this juncture the present petitioners had not only objected to the 1971-1972 pupil assignment plan, but had moved to reopen the case for evidentiary hearings *de novo*, contending that the overall desegregation plan as approved by the Court of Appeals was in conflict with the principles laid down by this Court in *Swann* and its companion cases. The District Court on June 30, 1971 denied further evidentiary hearings, finding that the Dade County school system was in truth unitary in light of *Swann* (R. 7). The petitioners took an appeal from the last-mentioned two orders of June 18 and 30, 1971. The Fifth Circuit affirmed summarily under its Local Rule 21—and this Court refused to grant a petition for certiorari from that decision. *Pate v. Dade County School Board*, 447 F.2d 150 (5th Cir. 1971), *cert. den.* 405 U.S. 1064, 92 S.Ct. 1493 (1972).[1]

[1]For a fuller account of the early history of the case, we refer the Court to the School Board's Brief and Appendix filed in that certiorari proceeding, which appeared in this Court as *Alice Love v. Dade County School Board*, case No. 71-918, October Term, 1971.

The next attempt by the petitioners to require racial balances came in 1973, but was mooted when the School Board, under threat of the attempt to force new plenary hearings, discontinued consideration of tentative additional steps (R. 297).

Ironically enough, while the present petitioners have recurrently sought to reopen the case on the conception that the school system is not unitary, the School Board has taken affirmative steps to further the desegregation process which have required it to defend (successfully) against attacks from the other end of the spectrum which have challenged the Board's actions as going *too far*. Thus, the School Board in 1972 found that the pairing of Miami Springs Junior High and Brownsville Junior High, which had been ordered by the Fifth Circuit in its 1970 opinion, had not worked effectively, and so grouped a third virtually all-white school to the original paired schools in an effort to stabilize the situation. The City of Miami Springs complained of this and petitioned to intervene. The Board resisted the attempt and the District Judge denied the petition (R. 292). In that order, while cautioning the Board as to its duties, the court said:

> "The Court wishes to recognize the substantial efforts of the Board to comply with its continuing responsibilities under the orders of this Court. It is clear that a good faith effort to accomplish further desegregation, although having already achieved unitary status, has been made."

The same grouping, which involved additional bus transportation voluntarily ordered by the School Board, was before the Court of Appeals in 1974. That Court found

the Board's grouping to be "an affirmative action to promote desegregation within a unitary school system," and affirmed the dismissal by the District Judge of a complaint filed by a group of parents and the City of Hialeah. *Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974).

3. The Latest Proceedings Below

Against this background, the current proceedings were initiated by a "Petition for Supplemental Relief . . . (etc.)" filed June 20, 1974, in which the intervenors in the lower courts once again demanded plenary evidentiary hearings, with the purpose of forcing the adoption of complete and comprehensive new desegregation plans for the entire county school system (R. 62). As a basis this time for demanding more hearings, the Petition focused upon a recent revision by the School Board of the student feeder plan for one senior high school, and upon a tentative five-year construction plan approved by the Board.

The School Board filed a Motion to Dismiss and factual Response, with exhibits attached, and *sworn to* by the school system's Director of the Office of Equal Educational Opportunity (R. 232). The intervenors filed a reply (R. 281), and the District Judge heard full and extensive argument, supplemented by an exchange of letters concerning aspects of the construction plan (R. 306-319).

The District Court held that the petitioners had failed to make a *prima facie* showing, under the burden defined in his orders of June 14 and 18, 1971, sufficient to justify action with respect to the high school feeder plan, or the demand for consideration of a comprehensive new deseg-

regation plan. However, the court did schedule a hearing to consider whether implementation of the construction plan would adversely affect the existing unitary system (R. 298, Pet. appendix 5).

On motion the court certified its rulings as final judgments under Rule 54(b), and petitioners appealed. The School Board did not cross-appeal from the portion of the order scheduling a hearing on the construction plan. The Court of Appeals affirmed (Pet. appendix 1), after summarizing the history of the case in its opinion and observing:

> "The record shows that the Dade County School Board has taken effective steps to further the desegregation process."

4. The Facts Presented to the Lower Courts

Petitioners' statement of the facts ingenuously consists only of selections from their Petition for Supplemental Relief filed below, and ignores the comprehensive and sworn Response filed by the School Board. Our argument to the courts below not only challenged the sufficiency of the Petition on its face, but also went to the merits of the contentions, in the light of the factual explanations, supported by data in exhibits attached, contained in the Board's Response. The petitioners never disputed the accuracy of the Board's factual representations or statistical exhibits, except for some differences which developed after the hearing in the District Court concerning expected racial attendance in schools yet to be built. These differences are not material here, because the District Judge *has* ordered an evidentiary hearing to inquire into the

Board's construction plan. As for the issues before the Court of Appeals and now being repeated to this Court —the high school feeder plan and the question of justification for new comprehensive desegregation planning—the material facts are substantially undisputed, and were so treated in the proceedings below. Petitioners filed no sworn traverse of any of the Board's factual submissions, nor did they at any time during or after the hearing proffer testimony as being necessary to a decision by the District Judge. Procedurally, therefore, the matter was properly decided upon the whole record, as is clearly permissible under Rule 12(b) of the Federal Rules of Civil Procedure.

We believe that it is unnecessary to try to restate the facts in full, which would simply involve a repetitive paraphrasing of the explanatory and statistical content of the Board's Response. The full facts and circumstances relating to the claims made in the Petition below can only be gathered from the Response, which we urge the Court to read in full (R. 232-263). For summary purposes here, we will only point out the essentials of the Response, to balance the petitioners' astigmatic presentation of the facts in their petition.

A. 1974 Feeder Plan

The Petition below claimed "intentionally segregative School Board action" in its approval of a revised student feeder plan for Miami Northwestern Senior High School.

The Response explains the new plan, its purposes and effects, in light of the history of this school and its tradi-

tional elementary and junior high "feeder" schools located in the virtually all-Negro north central district of the school system. The Response points out:

> (a) The purpose of the plan is racially neutral —to rectify a fragmented and bizarre student assignment system, unique within the school district, which has operated to the detriment of the black children involved, and jeopardized the continuance of Miami Northwestern Senior High School.
>
> (b) The effect of the plan is racially neutral —the students involved are all black, and there is no correlative reassignment or readjustment of white students to separate the races.
>
> (c) Although the feeder plan makes for an all-black student flow in the schools to feed Miami Northwestern Senior High, it gives those students a normal and vastly simplified progression of schools—and by taking many black students *out* of the old Miami Northwestern flow pattern, it places those students in desegregated junior and senior high schools.
>
> (d) The new plan does not disturb the existing desegregated schools in the area, and in fact will improve the racial mix in some of these.
>
> (e) Given the intractable fact of Negro residential isolation in north central Miami—a fact recognized from the beginning by the District Judge and by the Fifth Circuit as preventing

feasible desegregation of many of the schools involved in the feeder plan—the new plan simply improves the educational environment and progress of the black children involved.

(f) Nothing in the feeder plan restricts or prevents students from exercising their right to transfer under the Board's long-standing majority-to-minority transfer policy.

B. The Board's Construction Plan

Since the tentative construction plan is to be the subject of an evidentiary hearing, and was not an issue in the appeal below, it seems unnecessary to burden this Court with a premature analysis here. If it is defective it can be corrected, but it by no means follows, as petitioners suggest, that flaws in tentative construction planning must lead to new all-out comprehensive redesigns for countywide desegregation.

C. "Dual System"

The petition, under the suggestive heading "Dual System," presents a series of assertions that the Dade County school system is retrogressing, in an attempt to argue the conclusion that we are back to an old-fashioned dual system of schools. The Petition for Supplemental Relief in the District Court tried, for example, to show that the unitary plan approved by the Fifth Circuit in 1970 has "failed," by selecting some 36 schools (out of a total of 60 originally paired and grouped) and complaining that black student percentages have exceeded original predictions.

The Board's Response shows (1) no School Board action or default is alleged to have caused these variations; (2) majority black schools are not *per se* segregated; (3) only one of the schools listed is over 85% black. The Response, then, by Exhibits III and IV attached, demonstrates (1) when *all* grouped and paired schools are considered, the picture in terms of racial mixture is quite satisfactory; (2) the School Board by voluntary, affirmative action has *added* 11 schools to the network of paired and grouped schools, with substantial desegregation having resulted in every case. Going further, the Response by Exhibit IV attached displays a panoramic view of the progress of desegregation in the whole school system from 1968-1973. Of particular interest—the number of 90-100% black schools has remained stable since 1970, the year the Court of Appeals ruled the system to be unitary, while 100% white schools have decreased from 33 in 1970 to 10 in 1973. Concurrently, the number of schools enrolling 1—30% black students has increased from 106 in 1970 to 132 in 1973.

The Petition for Supplemental Relief filed below then contains a section called "School Board Discriminatory Action and Inaction" which is largely emotional argument. Its factual assertions when boiled down relate to the closing of one black school and conversions of two others. The Board's Response simply points out that these were all accomplished, for good reasons, before or during the litigation leading to the unitary status achieved in 1970, and so are irrelevant matters.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. **Post-Unitary Jurisdictional and Remedial Standards**

The essential issues presented by the petition are the same as those argued to the lower courts—whether, upon the whole record, the District Judge was required either to enjoin the School Board's revised feeder plan for Miami Northwestern Senior High School, or to reopen this litigation and begin again with countywide desegregation schemes as if the history of the past four years were nothing.

Since the Dade County school system is and has been unitary since 1970, it is important first to analyze the method and implications of the petition, in the perspective of the history of this case.

As we noted earlier, the Petition for Supplemental Relief filed below was the latest in a series of persistent attempts by these intervenors (petitioners) to reopen the entire desegregation process in the public schools of Dade County, and to induce the lower court to impose a countywide system of racial balances in the schools. The Petition ignored the history of this case, the principles laid down by this Court, and the overall working experience of the school system, in its dogmatic new offensive directed toward racial quotas.

The Dade County school system, when declared unitary in 1970, contained some all-white and all-black schools, and other schools of varying racial percentages susceptible of criticism by the purists. The desegregated school

system was and is a compromise between ideals and practicalities, as most things in life are. Nevertheless, the system was held unitary, in spite of petitioners' demands at the time for racial quotas in all schools. *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. den.* 402 U.S. 953, 91 S.Ct. 1613 (1971).

In 1971, after the landmark decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971), these petitioners sought to reopen the case, contending that the District Judge and the Court of Appeals had failed to apply correct legal principles in approving the Dade County school system as unitary. The District Judge rejected the demand, the Fifth Circuit summarily affirmed, and this Court denied certiorari. *Pate v. Dade County School Board*, 447 F.2d 150 (5th Cir. 1971), *cert. den.* 405 U.S. 1064, 92 S.Ct. 1493 (1972).

In 1973, another attempt to reopen proceedings and force hearings on plans for racial quotas in the schools was aborted when the School Board, possibly reacting to the threat of disruptive litigation, dropped consideration of certain revised student feeder arrangements, and other tentative plans for additional steps in the desegregation process.

Petitioners' efforts in the last few years, therefore, might be credited with having had the effect of chilling additional measures which might otherwise have been taken by the School Board to improve, by gradual steps, its desegregated system. Petitioners doubtless see this as a virtuous result, from their fixed position demanding racial quotas, or proportions, in all schools. We disagree, and we think it necessary that this position be seen for

what it is—a rigid and uncompromising doctrinaire effort to restructure the entire school system to suit these petitioners' conceptions of "desirable" racial balances, heedless of the substantial progress (admittedly imperfect) made and being made by the Board against complex pressures and counterpressures. The result sought is clearly not required by the law, and their recurrent attacks upon the school system serve only to cloud the issues, stir needless suspicions, and dampen the Board's initiative as it seeks ways to improve the educational opportunities for all students. As the Court of Appeals and the District Judge have both explicitly recognized, this case has never presented the picture of a recalcitrant school board resisting desegregation and trying to evade its constitutional obligations. On the contrary, the Dade County School Board has not only accepted and carried out the mandates of the courts below, it has acted affirmatively, in the face of popular and political opposition, to further desegregation goals. By voluntarily adding schools to those originally paired and grouped by court order, the Board has successfully extended desegregation within the system. By adjusting court-ordered school pairing and requiring additional busing (hardly a popular move these days) the Board has demonstrated its determination to maintain its unitary system, as the Fifth Circuit has recently had occasion to witness and approve. *Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974).

The apparent design of the current petition is to attempt to convince the Court that the School Board, in revising one senior high school feeder plan, and/or in approving a tentative construction plan, had acted to reestablish a dual system, and thus—presto!—the slate is clean, four years of history and struggle are to be ignored,

the judgment of the Court of Appeals and the subsequent supervision by the District Court are for naught, and we must start all over again and allow Dr. Finger to give us a fresh master plan for racial balances throughout the county.

This, of course, is nonsense. If the School Board has perchance mistaken its way with respect to the feeder plan, or the construction plan, to the extent of constitutional violations (which we strongly deny), then corrective action should and must be taken, in order to carry out the charge of the Court of Appeals that we "assure the maintenance of a unitary system". It does not follow at all that the whole school system must be reorganized.

As we pointed out in our Statement of the Case, the District Court, in its order of June 14, 1971, laid down principles reflecting its limited continuing responsibility to monitor the unitary school system in Dade County, and by its order dated June 18, 1971, the court stated that henceforth:

> "... The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the school board's failure to act in accordance with the principles outlined in this Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

This order was the subject of the 1971 appeal, and was affirmed. It therefore became the law of the case insofar as it defined the burden placed upon these petitioners with respect to any attempts to challenge the School Board's

continuing supervision and maintenance of its unitary school system. By the same order, it is apparent that the District Judge recognized and stated that his jurisdiction is now limited in scope, and may be invoked only to correct School Board actions or defaults which are shown to threaten the unitary status of the system.[2] This is quite a different jurisdictional situation than was the case before the school system was declared unitary—and rightly so. Once the judicial desegregation process had been completed and the entire county school system had been held to meet constitutional requirements, the School Board was and is entitled to be free of endless attempts by disappointed parties or new intervenors to force further wholesale reevaluations and revisions. This was the clear teaching of the *Swann* case, when this Court set the guidelines for judicial authority after a school system had attained unitary status:

> "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the

[2]The District Judge maintains continuing contact and scrutiny, however. A court-appointed BiRacial/Tri-Ethnic Committee reviews and reports to the Court upon the School Board's plans for student assignments, school site selections and other actions affecting the status of desegregation. In addition, the School Board files comprehensive semi-annual reports with the Court, reflecting in great detail the racial distributions of students and faculty, the workings of the Board's majority-to-minority transfer provisions, proposed construction plans, and other statistics relating to the maintenance of desegregated facilities.

> school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." (*Swann, supra*, 91 S.Ct. 1267 at 1284).

The allegations in the Petition for Supplemental Relief filed below, when stripped of their emotional rhetoric and tested by the full factual context provided in the Board's sworn Response, failed entirely to make a *prima facie* showing of School Board action to reestablish a dual school system, and thus it failed the jurisdictional test set forth in the District Court's order of June 18, 1971.

Further, it seems clear that petitioners' burden can be no less than to show a constitutional violation in order to justify remedial action, much less a total reopening of the litigation as they have demanded. Judicial powers may be exercised only on the basis of a constitutional violation, and the courts have no authority to substitute their judgment for that of a school board. *Swann, supra*, 91 S.Ct. 1267 at 1276. If this is true in the initial testing of a school system against the requirements of the Fourteenth Amendment (as was the case in *Swann*), it must be at least as true and binding upon the lower court here as it contemplated a system already thoroughly reorganized and long operating as unitary under judicial guidance.

Finally, on the question of the scope of remedial jurisdiction, this Court has plainly held that the remedy in each case is to be fitted to the size of the problem:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann, supra,* at 16."
>
> *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 3127 (1974).

Petitioners completely disregard this principle, and even try to stand it upside-down by claiming (Petition p. 17) that the District Court, in deciding to hold a future hearing to examine the School Board's tentative construction plan, has found a *prima facie* violation to exist. This is exactly what the District Court has *not* found, and the School Board is confident that no such violation can be shown when the hearing is held. Our point here is that even if some aspects of the construction plan should be disapproved, the remedy would properly be limited to the correction of the perceived defects.

Accordingly, it remains for us to examine the record, to see whether or not petitioners met these jurisdictional-remedial tests in their objections to the revised senior high school feeder pattern, or in their demand for a new "comprehensive desegregation plan." It will be our purpose to show that nothing approaching resegregative action in violation of constitutional principles has been suggested by the School Board's actions, and that in truth the history of the desegregation process in Dade County shows steady *improvement* in the unitary structure, rather than any basis for wholesale reconstruction of the system.

2. **The School Board's Revision of the Feeder Pattern for Miami Northwestern Senior High School was a**

Normal and Needed Administrative Correction, Racially Neutral and Having No Adverse Effect on the Unitary System.

The petition attempts to characterize the School Board's revised feeder plan for Miami Northwestern Senior High School as a violation of the 1970 decision of the Court of Appeals, and/or an "intentionally segregative" action rendering the Dade County school system a "dual system." The Court of Appeals, by its decision below, obviously held that the Board's revision of the feeder plan did not run afoul of that Court's mandate.

It must first be observed that this high school, as well as Drew Junior High, its junior high feeder school, as well as six elementary schools which have traditionally fed students to Miami Northwestern Senior High, are now all-black and were all-black when the system was ruled unitary in 1970. The Court of Appeals held then that this cluster of schools in the central Negro residential district of Miami simply could not feasibly be desegregated. See *Pate, supra*, 434 F.2d 1151 at 1155, 1157, 1158.

Residential patterns have not changed, and the problem of these schools remains as intractable as ever. The question, then, is whether in administering these schools *as they are* (not as they might be in the best of all possible worlds) the School Board may make reasonable and racially neutral adjustments in student assignments, to correct irrational and educationally unsound feeder arrangements which have operated to the detriment of the black children involved. If not, then the Board can easily return to the old outlandish feeder system. When the new feeder pattern is understood, however, a forced return to the old

system cannot be justified except on the spurious theory which underlies appellants' argument—that black children attending school with other black children is always and in every case bad and impermissible. The Court of Appeals did not accept that theory in 1970, and the School Board's 1974 action in revising the Miami Northwestern feeder pattern simply dealt with existing realities and sought to improve the educational opportunities for the children in the entire complex of schools affected. Under the old feeder arrangements the children were in effect being penalized because they are black, by being subjected to fragmented assignment patterns unique within the school system and unjustifiable on any basis except in terms of temporary racial mixture for some of the students. The new feeder system comes to grips with reality and provides a stable flow for some of the children, albeit within one-race schools, while concurrently placing the rest of the children within a stable flow through desegregated junior and senior high schools. Petitioners' claim that children are being "locked in" to all-black schools ignores the fact that the feeder plan also "locks out" the black students from elementary schools now *removed* from the flow to Drew Junior High and Miami Northwestern Senior High. (See Exhibit II to the School Board's Response filed below, R. 250).

The reasons for the new feeder pattern and its effects have been set forth in the Response filed below, with its Exhibits (R. 232-263). Accordingly, this brief will not repeat what is there explained in full. We will simply point out that under the feeder plan Olinda, Drew, Holmes and Orchard Villa Elementary Schools will feed Drew Junior High School which will feed Miami Northwestern Senior High School. All of these elementary schools except

Holmes are presently 100% black elementary schools. Children from all of these elementary schools except Holmes were already feeding Drew Junior High School, which has been the primary feeder for Miami Northwestern Senior High School. It is apparent that none of these schools will change in racial composition except for Holmes Elementary School, which will go from about 98% black enrollment to an estimated 99% black enrollment. A change of an estimated one (1%) percent (about eight children) in enrollment can hardly be seen as state action designed to enforce segregation.

It is also apparent that the change in the feeder plan does not affect any white students. Drew and Northwestern are now 100% black schools, and always have been. Under the new plan, they will continue to be 100% black schools. The children being channeled to these schools are necessarily black children. It is not possible to segregate white students from black students when the only students involved are black students. It is simply not possible to view this feeder plan as in any way segregative.

We take strong exception to statements in the petition to the effect that black children are being "guaranteed" an all-black education. Petitioners are well aware of the school system's flexible majority-to-minority transfer policy, which truly guarantees that no child need go to a school where his race is in the majority. These children are in no sense being sentenced, as petitioners imply. They are simply placed in a logical flow with their classmates to (1) one junior high school (a good and modern junior high school, by the way) rather than to a hodgepodge of schools, and (2) one senior high school, which

both community and School Board very much want to preserve and strengthen.

Petitioners try to claim that the School Board is placing the burden of desegregation on black students only, by referring to certain students who are transported under the feeder plan to (desegregated) junior and senior high schools. As the Board's Response shows, these students have in the past also been transported, because Dorsey Junior High, their original (black) junior high school was closed in 1970 before the school system reached unitary status. There is nothing new in this transportation plan, and no corresponding need to cross-bus white students, with no junior high school to receive them. In addition, the surrounding senior high complexes are already desegregated (see Exhibit I to Response filed below, R. 246-249) and thus cross-busing to make racial mixes in the inner-city black schools is no more feasible now than it was in 1970.

Petitioners further complain that they were denied an evidentiary hearing on the new feeder plan. In the first place, the facts and data before the lower courts with respect to the plan were not in dispute—only the arguments and conclusions offered by the parties conflicted. It is obvious that petitioners either misunderstood or misinterpreted the nature and effect of the plan, and in any event were primarily interested in trying to use it as a device to serve their purpose of procuring a plenary reopening of the entire litigation. The courts below had a full development of the facts and circumstances in the record, and no real need for more hearings. The District Court's legal conclusion (that the plan does not evidence reversion toward a dual system) was simple enough, and amply supported.

The feeder plan can in fairness only be seen as it is intended—an administrative rearrangement which straightens out a mess. In the judgment of the Board, it is for the best educational benefit of all the students affected, and in the best interests of improving a high school which everyone wants to keep. The black students in the feeder plan may opt out if they wish, and at any time. For the other side of the coin, the black students who are simultaneously excluded from the Northwestern feeder plan are fed to desegregated schools. Admittedly a compromise, the new plan is far and away better than the old confusion, and it simply does not present any semblance of a return to a dual system.

3. **The Dade County School System, Unitary for Five Years, Demonstrates Improvement Rather Than Regression, and No Basis Exists for Massive Reconstruction Through New Comprehensive Desegregation Plans.**

The whole thrust and purpose of the Petition for Supplemental Relief filed below was to force wide-open new evidentiary hearings, with the object of engaging in full-scale new comprehensive planning to redesign the county school system. As the entire history of this case demonstrates, the School Board accepts and is anxious to carry out its duty to maintain its unitary system. It has acted in the past and will continue to act to correct deficiencies as and when they occur. This is what the standing orders of the Court of Appeals and of the District Court require. The petitioners' objective—comprehensive master planning to fix racial balances in all schools—goes far beyond legal or rational requirements.

Aside from their objections to the Miami Northwestern feeder plan and the School Board's tentative construction plan, the petitioners resorted in their Petition below to a specious percentage game, seeking to show that the court-approved unitary system has "failed." As we explained in our Statement of the Case herein, their list of schools in which black student percentages have increased is incomplete—and even as to these, there is no allegation that the School Board in any way caused the changes. The full picture of grouped and paired schools, including those later added by School Board action, shows a working, if not perfect, desegregation process (See Exhibit III to Response filed below, R. 253). Moreover, the statistical record over the years (Exhibit IV to the Response, R. 257), shows no increase in 90-100% black schools, a large decrease in all-white schools, and a steady increase in schools enrolling 1-30% black students. This is hardly evidence of reversion to a dual system.

Petitioners have attempted to extract language from *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686 (1973) as the basis for their attempt to throw open the entire system to reorganization. The *Keyes* case comes nowhere near supporting the petitioners' radical interpretation.

In *Keyes*, the Court dealt with a school system never before tested by judicial scrutiny, and with no history of segregation by statutory mandate, but found a "purposeful and systematic program of racial segregation" carried out over a period of years by the local school board, affecting a substantial portion of the students, schools, teachers and facilities within the system. Holding this sufficient to create a presumption that other segregated

schooling in the district was not "adventitious", the Court remanded for further evidence to determine whether the school board's deliberate segregative policies over a decade rendered the entire district a dual system and thus subject to the dismantling process and procedures set forth in *Swann* and earlier decisions.

The Dade County school system has already undergone the dismantling process, and neither the Northwestern feeder plan, nor simple changes in student ratios in some schools, compare in any way with the factual situation which the Court found in *Keyes*. Even the incomplete quotation used by petitioners (Petition p. 18) serves to refute their attempted analogy, for as we have shown earlier, the Miami Northwestern feeder plan does *not* have ". . . the reciprocal effect of keeping other nearby schools predominantly white", since those surrounding schools have long been integrated. In short, no case law and no logic suggests that once a school system has been dismantled and held unitary, the whole system has to be dismantled all over again—even if the courts below had found flaws in the feeder plan, or might later find flaws in the construction projections.

It appears to us that petitioners revealed the weakness of their complaints concerning the feeder plan and the construction plan, by spending almost half of their Petition below trying to find ways to portray the school system as somehow degenerating, or "in jeopardy." Their position and their argument are based upon mistaken preconceptions.

In their preoccupation with racial quotas, petitioners filed a document, the major premise of which seemed to

be that if the student bodies of some schools in the Dade County school system are increasing in black population, the system is becoming segregated.

The School Board does not accept the premise that an increase in black enrollment necessarily creates an undesirable situation, or a situation which in and of itself denies the equal protection of the laws to anyone. It is of note that the District Court in 1970 stated that a predominantly black school is desegregated when less than 85 percent of its enrollment is composed of black students. *See Pate, supra*, 434 F.2d 1151 at 1175. Of all the 36 schools listed in the Petition below as having increased in black membership, only one of these schools has a black enrollment in excess of 85 percent.

The Petition below indicates, and the Board admits, that some Dade County schools are increasing in black student population. It is also true that no Dade County schools are in the process of becoming majority white schools. This is not a situation where the races are segregating. This is a situation where black student population is increasing throughout the schools of the county. The school system makes no apology for this trend.

Part of the reason for the increased black enrollment in many of the previously "white" schools is the school system's majority-to-minority transfer plan. It is working. When students have these choices available to them, and make these choices, it is not reasonable to allege state-imposed segregation. Part also of the record of increased black enrollment is the School Board's demonstrated record of planning school attendance zones to provide integrated schools. As Exhibit III to the Response filed below shows

(R. 253), the Board has not been content to rest with the groupings and pairings set by the court, but has added a number of schools to improve the desegregation process.

While petitioners may feel that a ratio of 25% black and 75% white students in each and every school throughout the system is desirable, there simply is no constitutional requirement that this be done, and the imposition of any particular degree of racial balance is beyond the power of a district court. *Swann, supra*; *Bradley v. School Board of City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd. per curiam* 412 U.S. 92, 93 S.Ct. 1952; *Spencer v. Kugler*, 326 F.Supp. 1235 (D.N.J., 1971), *aff'd. mem.* 404 U.S. 1027, 92 S.Ct. 707.

Even in systems never before declared unitary, it is stated that while school systems should make every effort to achieve the greatest possible degree of actual desegregation, the school system must also take into account the practicalities of the situation. *Davis v. Board of School Commissioners of Mobile*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292 (1971).

Such practical considerations are: the limited usefulness of racial quota ratios; secondly, the necessity of tolerating some one-race schools because minority groups concentrate in urban areas; thirdly, the logistical problems inherent in remedial alteration of attendance zones; and lastly, the limitations on travel that must be considered when transportation remedies are employed. *Northcross v. Board of Education of Memphis City Schools*, 489 F.2d 15 (6th Cir. 1973), *cert. den.* 416 U.S. 962 (1974).

The other premise which seems to underlie the Petition below is that all-black or virtually all-black schools are

bad schools. We reject this notion, and we see it, in fact, as approaching a racist preconception. Obviously, it is desirable to have mixed student bodies wherever possible, but where it is not feasible there is no warrant for any *a priori* labeling of black schools as inferior.

It is true that the Dade County school system has a number of one-race or almost-one-race schools. It is also true that despite these one-race or almost-one-race schools, the school system has now three times been held unitary by the Court of Appeals. The important fact is that the existence of some small number of one-race schools or virtually-one-race schools within a school system is not in and of itself a sign of a system which practices segregation by law. *Swann, supra,* 91 S.Ct. at page 1281.

This school system, the last time it was challenged, through the lower courts and to this Court, carried the *Swann* burden of showing that these schools were not discriminatory. The number of one-race or virtually-one-race schools has not been increased, nor is there any allegation by petitioners that this is so. Accordingly, the Board need not once again prove that the existence of these schools is not discriminatory.

If anything is now clear in the law of desegregation, it is that the elimination of all schools having single or identifiably one-race student bodies is *not* required by the Constitution. *Swann* said so, and in at least three later cases this Court has refused to entertain challenges based upon black student-counting. This very case was the first. The second was *Goss v. Board of Education of Knoxville,* 482 F.2d 1044 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974). The last was *Northcross v. Board of Education of Memphis, supra.*

Furthermore, petitioners overlook the fact that the racial composition of the student body is not the sole criterion for determining whether a constitutional problem exists. It is true that, where it is possible to identify a school as a "white school" or a "Negro School" on the basis of existing policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities, there is a *prima facie* case of violation of constitutional rights. *Swann, supra*, 91 S.Ct. at 1277.

The Petition filed below, however, mentions none of the above criteria, but devotes itself almost solely to the student head-counting.

Petitioners also make the rather curious argument that because the District Judge has decided to inquire into the School Board's tentative Five-Year Construction Plan, this somehow justifies the assumption that constitutional defects *will* be found, and they then proceed to leap to the conclusion that the only possible remedy could be the new "total desegregation plan" which they are anxious to submit. The School Board is perfectly willing to review its construction planning in detail before the District Court, but it rejects petitioners' *idee fixe* that specific adjustments would not be acceptable, and that only total new planning could be the solution to any problem. The remedy, if any is needed, should fit the problem, if any exists.

Rhetoric aside, the statistics show that the Dade County school system is not becoming more segregated. On the contrary, the system has made substantial steps, above and beyond those ordered by the courts below, to become a more integrated system. The system as a whole is well and going about the business of educating children, while

mindful of its obligation to maintain its unitary status. Its remaining schools with unmixed student bodies are well within tolerable limits, and no School Board segregative action has been shown, much less any reversion to anything resembling a "dual school system". With due respect to the eminent Dr. Finger's ability and reputation, there is simply no legal basis here for his comprehensive planning talents.

CONCLUSION

The courts below properly saw the Northwestern feeder plan as it is—a modest effort, neutral in purpose and effect so far as desegregation is concerned, to correct a bizarre and fractured student assignment situation. The District Judge will examine the School Board's construction plan, and it remains to be seen whether it is open to valid criticism.

In any event, flaws in either of these School Board actions cannot by any stretch amount to a legal predicate for an entire new dismantling of the whole school system.

The case before the Court is but one more recurrent reflection of petitioners' perennial fixation that only rigid racial balances in all schools can achieve "true" desegregation. This clearly is not the law, and there is no justification for the demand for new hearings, new beginnings, a Finger plan, and a top-to-bottom redesign of the Dade County schools to suit petitioners' theories. The petition should be denied.

Respectfully submitted,

FRANK A. HOWARD, JR.
1410 N.E. Second Avenue
Miami, Florida 33132
Attorney for Respondent
Dade County School Board

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorneys of record, on the ____ day of June, 1975.

FRANK A. HOWARD, JR.
1410 N.E. Second Avenue
Miami, Florida 33132

ALFRED I. HOPKINS, ESQ.
c/o A.C.L.U. of Florida
1701 Meridian Avenue
Miami Beach, Florida 33139

MAURICE ROSEN, ESQ.
c/o A.C.L.U of Florida
16666 N.E. 19th Avenue
North Miami Beach, Florida

CHARLES E. MINER, JR., ESQ.
General Counsel
400 Barnett Bank Building
Tallahassee, Florida 32304

TOBIAS SIMON, ESQ.
1492 South Miami Avenue
Miami, Florida 33130

JAMES W. MATTHEWS, ESQ.
5022 N.W. 7th Avenue
Miami, Florida 33127

IRMA ROBBINS FEDER and
RICHARD YALE FEDER, ESQS.
c/o A.C.L.U of Florida
110 N. Hibiscus Drive
Miami Beach, Florida 33139

FRED DAVANT, ESQ.
Biscayne Building
19 West Flagler Street
Miami, Florida 33130